



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. **78-1610**

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

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Petitioner United Air Lines, Inc. (herein "United") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on November 21, 1978, and amended by order of January 25, 1979.

OPINIONS BELOW.

The class order of the district court of March 1, 1978 is unreported and appears in the Appendix at A1-A2. The opinion of the Court of Appeals of November 21, 1978 is not yet reported and appears in the Appendix at A3-A10. The Order of the Court of Appeals of January 25, 1979, denying United's

petition for rehearing and amending the opinion of November 21, 1978, is not reported and appears in the Appendix at A11-A12.

JURISDICTION.

The opinion of the Court of Appeals was entered on November 21, 1978, and amended on January 25, 1979. Petition for rehearing and suggestion for rehearing in banc was denied on January 25, 1979. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1.a. Whether the Court of Appeals erred in holding, contrary to the Third and Ninth Circuits, that in a class action under Title VII of the Civil Rights Act of 1964 the statute of limitations for putative class members is tolled by the filing of a charge with the EEOC by other than the named class plaintiff.

b. What event commences a class action under Title VII of the Civil Rights Act of 1964?

2. Whether the Court of Appeals erred in requiring the trial court, contrary to the premise of this Court's decision in *United Airlines v. McDonald*, 432 U. S. 385 (1977), to certify a class on remand which included a subclass not included in the original complaint, not requested of the trial court by the named plaintiffs, and with respect to which subclass the limitations period had long since expired under the tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U. S. 538 (1974).

STATUTES INVOLVED.

The relevant portions of Section 706(d) and (e) of the original Title VII of the Civil Rights Act of 1964, 78 Stat. 260, are as follows:

Sec. 706(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment

practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) [filing charge with state agency], such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier

Sec. 706(e) If . . . the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge. . . .

The relevant portions of Section 706(e) and (f) of Title VII of the Civil Rights Act of 1964, as amended effective March 24, 1972, 42 U. S. C. § 2000e-5(e), (f), are as follows:

Sec. 706. (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with the State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier

Sec. 706. (f) (1) . . . If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

STATEMENT OF THE CASE.

Background.

This suit was brought as a class action in May 1970 in the northern district of Illinois, *sub nom. Romasanta v. United Air Lines*, under Title VII of the Civil Rights Act of 1964 on behalf of "approximately twenty-seven or twenty-eight" former United female flight attendants "who have been discharged on account of marriage" pursuant to United's no-marriage policy which had been in effect until November 1968. Comp. ¶ 3. The named plaintiff, Carole Romasanta, was a discharged flight attendant. Brenda Altman, another discharged flight attendant, was added as a named plaintiff in October 1970.

An earlier suit filed in 1968—*Sprogis v. United Air Lines*, 44 F. 2d 1194 (7th Cir. 1971), *cert. denied* 404 U. S. 991 (1971)—had held that United's no-marriage policy was a violation of the sex discrimination provisions of Title VII. *Sprogis* had been brought as an individual action. After liability was determined an effort was made to convert that suit into a class action and consolidate it with the then pending *Romasanta* suit.

The class requested in both *Sprogis* and *Romasanta* consisted of two subclasses:

- I. All flight attendants discharged pursuant to the no-marriage policy between July 2, 1965 and November 7, 1968;
- II. All flight attendants who resigned upon marriage between July 2, 1965 and November 7, 1968 and who complained against the no-marriage policy by filing grievances under the applicable collective bargaining agreement or by filing charges under Title VII or under other state or federal laws or regulations banning sex discrimination in employment.

The trial court refused to convert *Sprogis* into a class action and denied consolidation with *Romasanta*. In December 1972 the trial court in *Romasanta* accepted subclass II as requested, but held that subclass I should be limited to those former flight attendants who had been discharged and had protested the discharge. Class status was denied, however, on the grounds of lack of numerosity. Intervention was permitted to thirteen former flight attendants who met the class as thus defined. A petition for an interlocutory appeal by the named plaintiffs of the class status determination was denied by the Court of Appeals. The petition identified the asserted class as defined above.

After extensive discovery and negotiations the claims of the named plaintiffs and intervenors were settled and on October 6, 1975 the suit was dismissed with prejudice.

On October 21, 1975 respondent McDonald—a former United flight attendant who had been discharged upon her marriage in September, 1968 and who had not filed a charge with the EEOC—moved for leave to intervene for the purposes of appealing the order of December 1972 denying class status. The trial court denied the motion as untimely. The Court of Appeals reversed, holding the intervention to be timely and that it was error not to certify the class. The class suit was described by the Court of Appeals as one on behalf of "other United stewardesses who were similarly discharged." *Romasanta v. United Airlines*, 537 F. 2d 915, 917 (7th Cir. 1976).

United's petition for a writ of certiorari on the timeliness of intervention was granted, and in June 1977 a majority of this Court held that the intervention was timely and affirmed the Court of Appeals. *United Airlines v. McDonald*, 432 U. S. 385 (1977). The Court distinguished *American Pipe & Construction Co. v. Utah*, 414 U. S. 538 (1974)—United's primary authority¹—on the ground that there intervention after class status

1. *American Pipe* had held that the applicable statute of limitations, tolled upon commencement of the class action, started running again upon denial of class action status.

denial was for the purpose of pursuing the intervenor's individual interest, whereas here McDonald was intervening for the purpose of appealing class status denial.

With respect to the critical issue of prejudice to United which might result from the late entry of petitioner McDonald into the case, this Court observed (432 U. S. at 392-3)—

The lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing United with "the essential information necessary to determine both the subject matter and size of the prospective litigation . . ." *American Pipe*, supra, at 555.

The class was described by this Court as "a class consisting of all United stewardesses discharged because of the no-marriage rule, whether or not they had formally protested the termination of their employment." 432 U. S. at 390.

Proceedings Following this Court's Decision.

Following this Court's decision, the case was remanded to the trial court. On remand, the district court certified the following class:

All women who were employed by defendant United Air Lines, Inc. as stewardesses or flight attendants and who, because of said defendant's no-marriage policy, were discharged between July 2, 1965 and November 7, 1968. (A2.)

Both petitioner United and respondent McDonald objected to the class order for different reasons. United claimed the class could not include those whose claims were time-barred at the time the class action was commenced, and that the earliest date for definition of the class had to be 90 days before the filing of a valid charge with the EEOC by the named plaintiffs.²

2. At the time this action was commenced, Title VII provided that a charge had to be filed with the EEOC within 90 days of the alleged discriminatory act. This requirement is jurisdictional. *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 798 (1973); *United Air Lines v. Evans*, 431 U. S. 553 (1977).

Respondent McDonald objected because the class was limited to those who had been discharged by United and did not extend to those who resigned upon or in anticipation of marriage.

Permission for interlocutory appeals on each of the two issues was granted, and the two appeals were consolidated for briefing and oral argument in the Court of Appeals.

On appeal, respondent McDonald argued that the tolling event would be the first date of filing of an EEOC charge by any former United flight attendant raising the same issue, rather than the date of filing of the EEOC charge by the named plaintiff. Contrary to decisions of other courts of appeal which have considered the question, the Court of Appeals here agreed with respondent and concluded that the temporal limits of the class would be from October 27, 1965—90 days before the filing of charges by former flight attendants Whitmore and Van Horn³—to November 7, 1968, the date the no-marriage policy was withdrawn.⁴A8-9.

On the issue of scope of the class, the Court of Appeals concluded that the class "must include not only 'dischargees' but also 'resignees' on or before marriage . . ." A7. United contended that this extended the class beyond that which the original named plaintiffs had requested and the class which this Court assumed was before it in holding in *McDonald* that late intervention did not prejudice United. These arguments were dismissed by the Court of Appeals as "pettifogging about the prior pleadings." A6. Thus the class of "approximately twenty seven or twenty eight" claimed in the original complaint has been enlarged to a potential class of over 1,000 ten years after the no-marriage policy has been abandoned.

3. Whitmore and Van Horn had been discharged by United under the no-marriage rule. After the trial court denied class status each intervened individually, their claims were ultimately settled and the cause was dismissed with prejudice as to them in October 1975.

4. The Court of Appeals also stated that if discovery turned up an earlier charge, this would be the measuring event. It also suggested that a period longer than 90 days prior to the date of filing might be appropriate depending on whether the newly discovered charging party had also filed charges with a state agency. A9 n. 10.

United's petition for rehearing was denied by the Court below on January 25, 1979.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals relating to the first question presented by this petition is in conflict with decisions of other courts of appeal. The decision below relating to the second question is inconsistent with decisions of this Court and includes as class members a subclass whose claims have long been time-barred. Both questions involve important issues of federal law in the administration of class actions under Title VII of the Civil Rights Act of 1964.

I.

In its prior decision in this case upholding the right of respondent McDonald to intervene, the Court found her to be "a member of that class against whom the statute had not run at the time the class action was commenced." *United Airlines v. McDonald*, 432 U. S. 385, 392 (1977).

The first issue raised here is the defining of the event which "commenced" the class action; for that event limits the temporal scope of the class to those against whom the statute had not yet run.

The Courts of Appeal for the Third and Ninth Circuits and many district courts have concluded, contrary to the decision of the Seventh Circuit in this case, that the tolling event is the filing of a timely charge with the Equal Employment Opportunity Commission ("EEOC"), alleging a violation of Title VII, by the person who subsequently files a timely complaint for class relief.⁵ Thus only those who could have filed a timely

5. There are two time limitations which are jurisdictional prerequisites to a lawsuit under Title VII. The first requirement is that a charge must be filed with the EEOC within 180 days of the alleged discriminatory act. Before the amendments to Title VII effective

(Footnote continued on next page.)

EEOC charge on or after the date the named plaintiff filed his or her charge are eligible to be in the class.

The Court below—contrary to the decisions of the other Courts of Appeal—held that the tolling event is the filing of an EEOC charge by *any* person, whether or not that person subsequently purports to act on behalf of the class. Thus in this case the Court below concluded that the temporal limits of the class would date from 90 days prior to January 26, 1966, the date on which two former United flight attendants filed EEOC charges protesting their discharge under the no-marriage rule.⁶ A9. Under the decisions of the Ninth and Third Circuits, the cut-off date would be 90 days prior to the date the named plaintiffs Romasanta and Altman filed their EEOC charges—either July 24, 1967 or May 16, 1968.⁷

(Footnotes continued from preceding page.)

March 24, 1972, this period was 90 days. If a State provides a vehicle for remedying the alleged discrimination, then the time for filing the charge is enlarged to 300 days, provided the charging party has filed a timely charge with the State agency. Before the 1972 amendments, this period was 210 days. The second jurisdictional prerequisite is that the lawsuit must be filed within 90 days of the charging party's receipt of a notice of right to sue issued by the EEOC. Before the 1972 amendments, this period was 30 days. See Statutes Involved, *supra*; *United Airlines v. McDonald*, 432 U. S. 385, 392 n. 11 (1977).

6. The two, Whitmore and Van Horn, intervened in this action in the district court upon denial of class status. They intervened on their own behalf to pursue their individual claims, as did the intervenors in *American Pipe*. Neither ever purported to act on behalf of a class.

7. United argued in the Court of Appeals that as between the two, the Altman charge was the proper tolling event. The original class plaintiff was Romasanta; United answered that she was not a proper party since she had settled and withdrawn her EEOC charge prior to filing the class suit. See *Kennan v. Pan American World Airways*, 17 FEP Cases 1445, 1447 (N. D. Cal. 1978): "a claim settled before the commencement of a Title VII class action" may not be "its jurisdictional basis." Altman, who had complied with the jurisdictional prerequisites to bringing a Title VII action, was added as a named class representative no doubt to forestall dismissal of the suit because of the infirmity in Romasanta's status. Because of its reliance on charges filed by other than the named plaintiffs, the Court below did not reach the question of whether the Romasanta charge could be the tolling event.

In *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir. 1975), cert. denied 421 U.S. 1011 (1975), the Court held:

A plaintiff may bring a class action on behalf of those who have not filed a charge with the EEOC. This tolls the statute of limitations for all members of the class. But *Wetzel* and *Ross* [the named class representatives] cannot represent those who could not have filed a charge with the EEOC at the time they filed their charges.

In *Inda v. United Air Lines*, 565 F.2d 554 (9th Cir. 1977), cert. denied 435 U.S. 1007 (1978), the same no-marriage policy involved in this case was challenged in another suit brought as a class action. The named plaintiffs there attempted to rely on the EEOC charges filed by the plaintiff in the earlier *Sprogis* suit and on the *Romasanta* charge in this case. In concluding that the then applicable 90 day statute of limitations was not tolled by charges filed by anyone other than the named plaintiffs, the court stated (565 F.2d at 559):

... [A]n employee, by filing an EEOC charge on his own behalf, is not acting on behalf of a class. As in the case of *Sprogis* (who sued only on her own behalf, *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971)), he may never act on behalf of a class. Until he does, so others cannot say that he has done for them that which is required of them by law.

The result is that timely filing of an EEOC charge is not a necessary condition to the obtaining of relief by one as a member of a class in whose behalf suit has been brought. However, if one brings suit on his own behalf, or as named plaintiff on behalf of a class, he must have secured a right to sue by timely following the procedures set forth in Title VII.

* * * * *

We conclude that the 90 day statute was not tolled by the filing of charges by others than *Inda* and *Moritz* [the named plaintiffs].

Numerous district courts have followed the same principle. In *Croker v. Boeing Company*, 437 F. Supp. 1138, 1178 (E. D. Pa. 1977), the court stated:

Title VII, as it existed when this action was filed, provided a 90 day limitation period for filing charges with the EEOC. Under Title VII, a plaintiff can bring a class action on behalf of persons who have not filed EEOC charges. Moreover, the filing of an EEOC charge tolls the statute of limitations for both the person who has filed the charge, and any class of persons he purports to represent. *On the other hand, a plaintiff's filing with the EEOC does not revive stale claims for which the 90 day time period has already expired at the time the plaintiff filed his charges.* In this action, the named plaintiffs can represent all persons who could have filed charges with the EEOC on June 19, 1968, the date plaintiff *Croker* filed her charge. All Title VII claims that did not accrue after March 23, 1968 (90 days prior to June 19, 1968) are barred by the statute of limitations. [Emphasis added.]

The district court in *Smith v. Union Oil*, 18 FEP Cases 1183 (N. D. Cal. 1978) finds the law to be "clear":

The law is now clear that a person is not a class member for back pay purposes unless he or she was the victim of employer discrimination within 300⁸ days prior to the filing of the named plaintiff's EEOC charge. See *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 9 FEP Cases 211 (3d Cir. 1975), cert. denied, 421 U.S. 1011, 10 FEP Cases 1056 (1975); *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 15 FEP Cases 1640 (N.D. Cal.

8. The difference between the 90 day statutory period described in *Inda* and *Croker* and the 300 day period in *Smith* arises out of the change in Title VII effected by the 1972 amendments to the 1964 Civil Rights Act, and the fact that a State remedy was available in *Smith* thereby enlarging the EEOC filing time. See *supra*, note 5. The appropriate limit in the instant case is 90 days, since the class action was filed in 1970 prior to the amendments, and at the time of filing the law of the states of domicile of the named plaintiffs provided no remedy for alleged sex discrimination.

1977); *Martinez v. Bechtel Corp.*, 10 E.P.D. 10,570, 11 FEP Cases 898 (N.D. Cal. 1975). On January 20, 1973, plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging unlawful employment practices by the defendant. March 26, 1972, is 300 days prior to January 20, 1973. Accordingly, the opening date for identification of the class is changed from January 20, 1971, to March 26, 1972.⁹

The decision of the Seventh Circuit here is not only contrary to that of other circuits, but introduces a tolling test which is virtually unworkable. The ultimate fallacy, in our view, is that the decision looks to the charge filed by the named plaintiff as satisfying the jurisdictional prerequisites to filing the suit, and a different charge to "commence the class action." Thus the Whitmore and Van Horn charges, upon which the court relies,

9. Other district courts have reached the same conclusion. *Movement for Opportunity v. Detroit Diesel*, 18 FEP Cases 557, 562 (S.D. Ind. 1978); *Albers v. Hycel, Inc.*, 18 FEP Cases 867, 870-71 (S.D. Tex. 1978); *Hubbard v. Rubbermaid, Inc.*, 78 F.R.D. 631, 644 (D. Md. 1978); *Webb v. Westinghouse Electric Corp.*, 78 F.R.D. 645, 653 (E.D. Pa. 1978); *Terry v. South Central Bell Telephone Co.*, 16 FEP Cases 1539, 1540 (E.D. La. 1976); *Lamphere v. Brown University*, 71 F.R.D. 641, 648 (D.R.I. 1976) appeal dismissed, 553 F.2d 714 (1st Cir. 1977); *Harriss v. Pan American World Airways*, 74 F.R.D. 24, 41 (N.D. Cal. 1977); *Coppotelli v. Howlett*, 76 F.R.D. 20, 22 (E.D. Ill. 1977); *Smith v. General Motors Corp.*, 14 FEP Cases 987, 991 (E.D. Mich. 1977); *Mays v. Motorola, Inc.*, 14 FEP Cases 1470, 1473 (N.D. Ill. 1977); *Grogg v. General Motors Corp.*, 72 F.R.D. 523, 534 (S.D.N.Y. 1976); *Carter v. Newsday, Inc.*, 76 F.R.D. 9, 15 (E.D. N.Y. 1976); *Taylor v. Vocational Rehabilitation Center*, 13 FEP Cases 452, 456 (W.D. Pa. 1976); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 16 (E.D. Pa. 1975); *Martinez v. Bechtel Corp.*, 11 FEP Cases 898, 906 (N.D. Cal. 1975); *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 294 (D. Del. 1975); *Hecht v. CARE, Inc.*, 5 FEP Cases 352, 356 (S.D. N.Y. 1972).

Indeed, a different panel of the Seventh Circuit in an earlier decision upheld the employer's contention that employees "terminated more than 90 days prior to May 31, 1970, the date the original plaintiff class filed its charges with the EEOC" were excluded from the class. *In Re Consolidated Pretrial Proceedings in the Air Lines Cases*, 582 F.2d 1142, 1147 (7th Cir. 1978). Emphasis added.

could not have been the basis for a suit since neither received a right-to-sue letter from the EEOC—the second jurisdictional prerequisite to filing suit. Indeed, as of 1972 (two years after this suit was filed), the EEOC was attempting to locate Ms. Whitmore. Neither can sue in the future for each has settled her claim.

But the decision below goes beyond this: after concluding that on the record before it the class would date from October 27, 1965—90 days before the filing of the Whitmore and Van Horn EEOC charges—the court then qualified this in a footnote as being only the "most likely tolling date." A9, n. 10. If either the Whitmore or Van Horn charges filed with the EEOC in January 1966 were pending before the Commission in March 1972 when Title VII was amended to provide a 180 day filing period, then the "new 180-day limitations period would apply," stated the Court below. This would back the class date to July 29, 1965, 180 days prior to the January 25, 1966 filing date. Thus the decision below holds that the class would include not only those who could have filed charges when Whitmore and Van Horn filed in January 1966, but also those who could have filed at that time if the March 1972 Title VII amendments had been in effect in January 1966.

The issue of the retroactive application of the March 1972 amendments to Title VII was considered by this Court in *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers*, 429 U.S. 229 (1976). There a charge had been filed with the EEOC 108 days after the alleged unlawful discharge, but within 180 days of the effective date of the March 1972 amendments, as of which date the charge had not been disposed of by the EEOC. This Court held (429 U.S. at 243):

... Congress intended the 180-day period to be applicable to charges such as that filed by Guy, where the charge was filed with the EEOC prior to March 24, 1972, [the effective date of the amending Act], and alleged a discriminatory occurrence within 180 days of the enactment of the Act. (Emphasis added.)

In a footnote to this holding, this Court stated that it need not decide whether the 180 day limitation period would be retroactively applied to charges filed between 90 and 180 days of the alleged occurrence "where the 180 days had run prior to March 24, 1972."

Here the Whitmore and Van Horn charges were not only charges filed by other than the named plaintiffs, but were filed six years before the March 1972 amending Act. The class suit itself had been filed two years prior to the 1972 Act. We suggest that serious constitutional issues would be presented were the Court of Appeals footnote to be followed.

The Court below did not stop here. In the same footnote (A9, n. 10), it stated that discovery "might turn up a prior EEOC charge, thus resulting in a different tolling date." The Court referred to a charge filed by another former United flight attendant, Helen Read Gunst, as a possible tolling event. To United's knowledge, Ms. Gunst never filed a charge with the EEOC, but only with the New York State Division of Human Rights. Her charge was settled in November, 1972 and the matter was closed (Case No. CS-12770-66, Appeal No. 1391). She sought to intervene in this case prior to the conclusion of her New York charge and intervention was denied by the trial court because of the pendency of her New York claim. She never sought review of that denial.

Under the Seventh Circuit rule, the class limits can be determined only after discovery. It invites pursuit of all charges, including those long settled and even perhaps those of which the employer has no knowledge. It raises potential dispute over the similarity of other charges. Problems of uncertainty of settlement are introduced since other charges might come to light after the class is defined and the case concluded. It places a construction on the March 1972 amending Act of dubious constitutionality.

Under the Third and Ninth Circuit rule, the basic temporal parameters of the class can be determined upon filing of the suit

by reference to the date the named plaintiff filed his or her EEOC charge.

We respectfully suggest that the tolling principle set forth by the Third and Ninth Circuits is the more rational approach to determining the temporal class limits.¹⁰ In any event, the confusion arising from the conflict¹¹ among the circuits should be resolved.

II.

Upon remand after this Court's decision, McDonald requested the trial court to include in the class former flight attendants who resigned because of the no-marriage policy, whether or not they had protested the policy. The trial court limited the class to those who had been discharged upon marriage. The Court of Appeals reversed on this point and held the class had to include resignees, thereby expanding the class beyond that requested by the named plaintiffs.

This expansion of the class by the court below, we submit, violates the fundamental principle that an intervenor takes the

10. The Romasanta, Altman, Van Horn and Whitmore charges were filed as individual, not class, charges with the EEOC. An alternative possibility is that the class action did not commence until someone purported to act on behalf of the class. See *Inda v. United Air Lines*, 565 F.2d 554, 559 (9th Cir. 1977), *cert. denied* 435 U.S. 1007 (1978). On that view, the class action did not commence until this suit was filed as a class action in May 1970. It was that event which gave United the "essential information necessary to determine both the subject matter and size of the prospective litigation." *United Airlines v. McDonald*, 432 U.S. 385, 392-3 (1977). Since United had terminated the no-marriage policy in November 1968, there could have been no persons other than the named plaintiffs who were not time-barred when the suit was commenced.

11. The conflict for a multi-state employer such as United is clear. Class action suits attacking the same employment practice—United's former no-marriage policy—are pending in this suit in the Seventh Circuit and in the *Inda* case, discussed above, in the Ninth Circuit. Each has now established a different tolling rule.

case as she finds it,¹² contradicts the assumption upon which this Court upheld the right of respondent to intervene, and is contrary to the tolling rule in *American Pipe & Construction Co. v. Utah*, 414 U. S. 538 (1974).

As noted in the Statement of the Case, the class proposed by the named plaintiffs included two subclasses:¹³

- I. flight attendants *discharged* pursuant to the no-marriage policy;
- II. flight attendants who *resigned* upon marriage and who *complained* against the no-marriage policy by filing grievances or charges under Title VII or other state or federal laws or executive orders barring sex discrimination in employment.

Thus, when the class was first proposed, the named plaintiffs distinguished between those discharged and those who resigned. They explained the reason for limiting the Subclass II to those who complained of the no-marriage policy on resignation:

The limitation of Class II plaintiffs to those who have protested the defendant's illegal policy by the filing of some type of grievance or charge gives further assurance that the persons included within the class resigned against

12. *General Insurance Co. of America v. Hercules Construction Co.*, 385 F. 2d 13, 18 (8th Cir. 1967) ("An intervenor accepts the pleadings as he finds them."); *Geisser v. United States*, 554 F. 2d 698, 705n6 (5th Cir. 1977) ("[A]n intervenor must accept the proceedings as he finds them."); *In re V. I. D. Inc.*, 177 F. 2d 234, 236 (7th Cir.) *cert. denied* 339 U. S. 904 (1949); *Philadelphia v. Morton Salt Co.*, 248 F. Supp. 506, 509 (E. D. Pa. 1965), (The greatest status intervenors may obtain is to "stand in the shoes of the party who brought the class suit on their behalf."). In some cases, intervention is conditioned or limited to certain issues, but in no event may the intervenor's rights be greater than the original parties. "It is sound to treat the intervenor as if he were an original party, but he should not have greater rights than do the original parties." 7A Wright and Miller, *Federal Practice and Procedure*: Civil, Ch. 5 § 1921 (1972).

13. The class is described in the Petition for Permission to Appeal filed by the named plaintiffs Romasanta and Altman from the 1972 order of the trial court denying class action status. The Petition is set out at pages 62-72 of the Appendix filed in this Court in *United Airlines v. McDonald*, No. 76-545.

their will because of defendant's policy rather than for any other reason.¹⁴

United accepted as valid members of the claimed class those described in Subclass II, *i.e.*, those who resigned and protested the no-marriage policy. This group was eventually permitted to intervene by the district court and their claims were settled before McDonald's intervention in October, 1975.

As we have noted, the complaint was filed on behalf of a class of flight attendants "who have been discharged on account of marriage . . . There are approximately twenty-seven or twenty-eight other such discharged stewardesses." Plaintiffs made clear that the term "discharged" was not intended to include all stewardesses who had resigned. Their counsel has confirmed, in a statement of record, that ". . . in both cases [*Sprogis* and *Romasanta*] we regarded those stewardesses who resigned as proper class members only if they protested, thereby showing that they resigned involuntarily."

Since the named plaintiffs never asked the trial court to include in the class those flight attendants who had resigned without protest, that issue could not have been the subject of an appeal whether prosecuted by the named plaintiffs or McDonald. The claims of all persons defined in Subclass II—those who resigned and protested—having been disposed of by the trial court, the only remaining class issue was Subclass I, those who had been discharged. In response to United's argument that the inclusion of resigned former flight attendants was never an issue and could not have been the subject of any appeal, the Court of Appeals simply observed that "pettifogging about the prior pleadings is not decisive anyway . . ."¹⁵

14. This explanation was contained in the Memorandum for Plaintiff on Scope of Class Entitled to Relief filed in *Sprogis*. This Memorandum was refiled in this case in support of Plaintiffs' Motion to Consolidate the *Sprogis* case and this case.

15. The Court of Appeals states in the text of its opinion that "even United told the district court that if it were appropriate to maintain the action as a class action, the 'only appropriate class

(Footnotes continued on next page.)

In *American Pipe & Construction Co. v. Utah*, 414 U. S. 538, 554 (1974), the Court enunciated the following class action tolling rule:

We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to *all asserted members of the class who would have been parties had the suit been permitted to continue as a class action*. [Emphasis added.]

If the trial court had certified the class initially sought by the named plaintiffs, it would not have included former flight attendants who had resigned without protest because they were never "asserted members of the class." The statute of limitations would not have been tolled respecting them, and their claims would have been time barred more than five years prior to the decision of the court below requiring their inclusion in the class, even assuming the named plaintiffs could have included them in the asserted class had they elected to do so.¹⁶

McDonald has recognized the principle that the intervenor takes the case as she finds it. In the prior case before this Court, she successfully argued that her intervention after final judgment in the trial court was simply for the purpose of permitting her to prosecute the appeal which the named plaintiffs could have but did not pursue.¹⁷

(Footnote continued from preceding page.)

would be all former stewardesses who resigned or were terminated because of defendant's no-marriage policy.'" A7-A8. In a footnote the Court noted the critical point that this concession was limited to those who protested. The Court failed to note that with respect to the subclass of resigned and protesting stewardesses, United was simply accepting what the original named plaintiffs had proposed. A7, n. 6.

16. The class representatives must possess the same interest and suffer the same injury as the class they purport to represent. *East Texas Motor Freight v. Rodriguez*, 431 U. S. 395, 403 (1977).

17. Resp. Br. in Opp. to Cert. Pet., 4-6; Resp. Br. 11, 14-15, 24 ("the intervenor seeks only to continue the original cause of action"), 26. In oral argument counsel for McDonald stated "The only difference about this case is that the appeal was prosecuted not by Romasanta but by McDonald." Tr. 42, No. 76-545.

It was this argument which apparently was critical to the majority of this Court in concluding that United would not be unduly prejudiced by the late entry of McDonald into the case:

United can hardly contend that its ability to litigate the issue was unfairly prejudiced simply because an appeal on behalf of putative class members was brought by one of their own, rather than by one of the original named plaintiffs. . . . United was put on notice by the filing of the *Romasanta* complaint of the possibility of classwide liability, and there is no reason why Mrs. McDonald's pursuit of that claim should not be considered timely under the circumstances here presented. 432 U. S. at 394-5.

The decision below undercuts the premise upon which this Court found that United would not be prejudiced by Ms. McDonald's entry into this case five years after it started. The filing of the *Romasanta* complaint did not put United on notice of classwide liability to any other than *discharged* former flight attendants.¹⁸ The prejudice to United in expanding an originally claimed class of approximately 30 into a potential class of over 1,000 ten years after it has abandoned the policy upon which the suit was originally based is overwhelming. How will it defend against a claim by a flight attendant who resigned in contemplation of marriage prior to November, 1968 that she resigned because of the no-marriage policy rather than because she intended to cease work upon marriage?

The named plaintiffs recognized the inherent proof problems 7 years ago when they limited the asserted class to resigned flight attendants who had protested the no-marriage policy so as

18. In *United Air Lines v. Evans*, 431 U. S. 553 (1977), this Court held that the claim of a United flight attendant who resigned in February, 1968 because of the no-marriage policy was time-barred because she had not filed a claim with the EEOC within 90 days of her resignation. Ms. Evans could now argue that despite this Court's decision, her claim is now viable because she is within the expanded class. Ms. Evans litigated her claim through the Seventh Circuit and no doubt was aware of the concurrent *Romasanta* litigation. The fact that she never claimed to be a member of the *Romasanta* class demonstrates the perception of resigned flight attendants that they were not part of the class.

to give "assurance that the persons included within the class resigned . . . because of defendant's policy rather than for any other reason."¹⁹ *Supra*, pp. 16-17.

Respondent McDonald, who pursued the appeal in their stead, must accept the case as they framed it and as they could have appealed it. This is the representation she made to this Court in 1977 when she convinced the Court her intervention would not prejudice United.

The decision of the Court below in now directing the trial court to enlarge the class to include a group never requested by the original named plaintiffs violates basic procedural principles and this Court's tolling rule in *American Pipe*, undermines the premise upon which this Court acted when this case was first before it, and is grossly unfair and prejudicial to United.

19. The record indicates that even after the no-marriage policy was terminated, a substantial number of flight attendants resigned upon marriage or failed to return from leave of absence taken upon marriage.

CONCLUSION.

For the foregoing reasons, we respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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April 1979.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLE ANDERSON ROMASANTA,
et al.,
Plaintiffs,
vs.
UNITED AIR LINES, INC., a corpora-
tion,
Defendant.
LIANE BUIX McDONALD, on her own
behalf and on behalf of others sim-
ilarly situated,
Petitioner.

No. 70 C 1157

ORDER.

This cause comes before the court upon defendant's motion to reconsider this court's order of January 11, 1978, entered pursuant to the mandate of the Court of Appeals for the Seventh Circuit in *Romasanta v. United Air Lines, Inc.*, 537 F. 2d 915 (7th Cir. 1976), *aff'd sub nom. United Air Lines, Inc. v. McDonald*, 97 S. Ct. 2464 (1977). The court having read and considered said motion and the memoranda of the respective parties, and the court having heard arguments by counsel and being fully briefed in the premises,

IT IS ORDERED:

1. This court's Order of January 11, 1978 be and it is hereby vacated.

2. Petitioner Liane Buix McDonald is hereby permitted to intervene as a party plaintiff on her own behalf and on behalf of her class, which is hereby defined as a class composed of all women who were employed by defendant United Air Lines, Inc. as stewardesses or flight attendants and who, because of said defendant's no-marriage policy, were discharged between July 2, 1965 and November 7, 1968.

3. This action shall proceed henceforth, and shall be maintained, as a class action pursuant to Rule 23(b), Federal Rules of Civil Procedure, on behalf of the afore-said class, with plaintiff Liane Buix McDonald to serve as class representative, and Thomas R. Meites and Lynn Sara Frackman to serve as attorneys for the class.

4. The parties shall forthwith endeavor to agree upon a proposed notice,—including a questionnaire to be completed and submitted by those persons claiming to be class members, and a form to be completed and submitted by those persons who desire to be excluded from the class,—said proposed notice to be submitted to the court on or before March 10, 1978.

5. This cause is set for a status hearing on March 15, 1978 at 9:30 A.M.

ENTER:

/s/ J. S. PERRY,
Judge

Dated: March 1, 1978

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-1699

LIANE BUIX McDONALD

Plaintiff-Appellant,

v.

UNITED AIR LINES, INC.,

Defendant-Appellee.

No. 78-2035

LIANE BUIX McDONALD

Plaintiff-Appellee,

v.

UNITED AIR LINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 70 C 1157—Joseph Sam Perry, *Judge.*

Argued September 26, 1978—Decided November 21, 1978

Before CUMMINGS, *Circuit Judge*, WISDOM, *Senior Circuit Judge*,* and SPRECHER, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* These consolidated interlocutory appeals raise two questions regarding the proper definition of

* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

the class of stewardesses entitled to relief for the loss of their employment with defendant airline because of its prior no-marriage rule. The rule was invalidated under Section 703(e)(1) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e-2(a)(1)) in *Sprogis v. United Airlines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), certiorari denied, 414 U. S. 991.

While some married stewardesses were terminated by the defendant, others resigned involuntarily because of the no-marriage rule. See *United Air Lines v. Evans*, 431 U. S. 553, 554. The plaintiff now argues that the scope of the class as defined by the district court is too narrow, whereas the defendant approves the scope of the class as certified but argues that the statute of limitations bars relief for many or all of the class members. We have accepted both questions on interlocutory appeal pursuant to 28 U. S. C. § 1292(b).

Scope of Class

Subsequent to *Sprogis*, which had proceeded as an individual action, Carole Romasanta brought the present case as a class action, but the district court struck the class allegations.¹ The *Romasanta* plaintiffs sought an interlocutory appeal of this denial of class certification, but this Court refused to accept the appeal. After judgment, the prevailing plaintiffs refused to appeal the denial of class status, which had then become appealable. Thereafter we permitted Liane McDonald to intervene to prosecute an appeal from the adverse class determination and reversed the denial of class relief. *Romasanta v. United Airlines, Inc.*, 537 F. 2d 915 (7th Cir. 1975), *affirmed sub nom. United Airlines v. McDonald*, 432 U. S. 385.²

1. Prior to refusing to certify a class in *Romasanta*, the district court had denied the plaintiffs' motions to consolidate *Sprogis* and *Romasanta*.

2. In *McDonald*, the Supreme Court agreed with us that Mrs. McDonald's motion to intervene was timely and should have been granted by the district court. No other question was before the high court.

On remand, the district court determined on January 11, 1978, that the class would consist of all women who were employed by United as stewardesses and who resigned or were terminated because of United's no-marriage policy between July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964, and November 7, 1968, when the no-marriage rule was abolished. However, on March 1, 1978, without explanation the court vacated that class order and narrowed the class to include only those women who were discharged between those dates, thus excluding those who resigned under United's no-marriage rule in contemplation of marriage. We hold that the district court's January 11, 1978, class determination was correct and that its subsequent order narrowing the class was improper.

Apparently the district court modified the class definition in response to United's motion to reconsider the January 11 order, in which United argued for the narrower class. United's basic argument, both before the district court and here on appeal, was that the *Romasanta* plaintiffs had never before sought the broader class, and therefore Mrs. McDonald was estopped to do so now. This argument involves lengthy disputes about the relevance of and the proper interpretation of various pleadings and supporting documents in the complicated history of this case.³ In large part, the argument turns on whether the term

3. United argues that the original *Romasanta* plaintiffs had sought a class composed of all stewardesses who were "discharged by United pursuant to its no-marriage policy" and all "stewardesses who resigned from their employment upon marriage * * * and who have complained against United's no-marriage rule by filing grievances * * * or charges under Title VII * * *" (Br. 18). United contends that it had persuaded the district court, when it first denied class designation in *Romasanta*, to apply the protest requirement not merely to employees who resigned, but also to those who were terminated by United. (This resulted in a group of plaintiffs too small to proceed as a class. Hence the qualifying plaintiffs were allowed to intervene and class status was denied.) It was only this extension of the protest requirement to terminated employees, according to United, which was reversed by this Court's decision holding class

(Footnote continued on next page.)

"discharged" was used in certain of those papers as a term of art meaning any involuntary termination of employment or as the equivalent of "fired." We do not find this line of inquiry instructive. The various parties seem to have had different interpretations of the class in mind, and the scope of the class was never clarified in any of the earlier phases of the case in large part because class status was consistently denied.

Pettifogging about the prior pleadings is not decisive anyway, for the stewardesses denied relief by the district court had resigned because of the no-marriage rule and were therefore constructively discharged.⁴ *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140, 144 (5th Cir. 1975). The inclusion of such persons in the class definition accords with the early motion of the *Romasanta* plaintiffs that their class include both fired and resigned stewardesses because the latter "were forced out * * * by the defendant's rule as effectively as those who were fired outright."⁵ Thereafter even United told the district court that if it were appropriate to maintain the action as a class action, the "only appropriate class would be all

(Footnote continued from preceding page.)

status appropriate in *Romasanta*. Therefore, United concludes, the class should be defined as it says the *Romasanta* plaintiffs originally proposed it.

We are unconvinced that United has properly interpreted the plaintiffs' earlier position. Moreover, as explained *infra*, United's statement to the district court in its motion to reconsider its January 11 order that the class as there defined was "contrary to the mandate of the Court of Appeals in this case, which defined the class as those 'similarly discharged' as was plaintiff *Romasanta*," misconstrues our position. Our *Romasanta* decision was not intended to be read as narrowly as United suggests.

4. The stewardesses who resigned must, as counsel for the plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief. Although it may be significantly easier for those who protested to make such a showing, we reiterate our *Romasanta* ruling that the fact that she did not protest will not foreclose a class member from making such a showing.

5. This motion proposed consolidation of the *Sprogis* and *Romasanta* suits, but, as noted *supra*, consolidation was denied.

former stewardesses who resigned or were terminated because of defendant's no-marriage policy" (R. 112).⁶ In truth the position of the stewardesses who resigned involuntarily cannot rightly be distinguished from the stewardesses who were fired, for United encouraged stewardesses to resign rather than await firing. *Inda v. United Airlines*, 565 F.2d 554, 557, 562 (5th Cir. 1977), certiorari denied, U. S. Indeed the district court once so recognized because it permitted Joanne Hammersly to intervene in the *Romasanta* case (R. 45) even though she had resigned in compliance with the no-marriage rule instead of waiting to be discharged.⁷ Consequently we cannot agree that the *Romasanta* plaintiffs committed themselves to limiting the class to that now urged by United.

Moreover, the district court's broad supervisory power in class actions requires it, especially in Title VII actions which attack class-based discrimination, to define the class to effectuate relief for all of its members. In *Romasanta*, we instructed the district court to fashion relief for all persons damaged by United's no-marriage rule in order to "establish equality, not only between the group discriminated against and other groups, but also among the members of the victimized group." 537 F.2d at 917, 918. Nevertheless, by its final class determination, the district court inexplicably denied relief to stewardesses who resigned to marry while according relief only to stewardesses who were discharged. Our *Romasanta* mandate was not so limited.

In holding that this class must include not only "dischargees" but also "resignees" on or before marriage, we are merely reaffirming our prior decision that relief must not discriminate

6. United simultaneously successfully proposed that the class be limited to those who had protested the no-marriage policy, but this was rejected in *Romasanta*, 537 F.2d at 919.

7. At that time, the district court included in the *Romasanta* class definition both designed and discharged stewardesses (6 FEP Cases, 156, 157), thus making it immaterial that the *Romasanta* complaint ab initio was limited to those who had been discharged.

between members of the group victimized by the no-marriage rule (537 F. 2d at 918). Apart from the illegal protest requirement (see note 6 *supra*), this is the same class definition proposed by United in November 1972, adopted by the district court in December 1972, re-proposed by Mrs. McDonald after remand in December 1977 and originally adopted by the district court in January 1978.

Period of Recovery for Class

On August 1, 1978, we granted United's petition for leave to appeal from the decision below insofar as the class order included stewardesses claiming from July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964. We agree that July 2, 1965, probably may not remain the starting date for relief.

In *Consolidated Pretrial Proceedings in the Airline Cases* (the "TWA" case), 582 F.2d 1142 (7th Cir. 1978), this Court held that the 90-day period for filing charges with the Equal Employment Opportunity Commission is jurisdictional under 42 U.S.C. § 2000e-5(d).⁸ However, as we held in *Romasanta*, "The statute of limitations in Title VII actions is suspended when one member of the class initiates the grievance mechanism." 537 F. 2d at 918 n. 6.⁹

The record (as supplemented on September 26, 1978) shows that class member plaintiffs Mary O'Connor Whitmore and Terry Baker Van Horn filed their EEOC charges on January 25,

8. The 90-day period for filing charges with the EEOC was extended to 180 days by the 1972 amendments. 42 U.S.C. § 2000e-5(e).

9. See also *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); *United States v. Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973); *Allen v. Amalgamated Transit Union*, 554 F.2d 876, 882-883 (8th Cir. 1977). *Inda v. United Air Lines, Inc.*, 565 F.2d 554 (9th Cir. 1977), is distinguishable because it involved an attempt by two individuals who had never filed timely complaints with the EEOC or a state agency to use the filings of other individuals to establish their right to sue.

1966. Therefore, the temporal limits of this class will date from October 27, 1965 (90 days before the EEOC charges) to November 7, 1968, when the no-marriage rule was withdrawn.¹⁰ This ruling is not unfair to United, for it was put on notice by the Whitmore-Van Horn filings¹¹ that aggrieved stewardesses were challenging its no-marriage rule policy. Therefore, it is unimportant that they were intervening plaintiffs rather than original plaintiffs in the *Romasanta* suit.¹²

10. On the basis of the record before this Court, October 27, 1965, appears to be the most likely tolling date. However, discovery may reveal that an earlier date is appropriate for several reasons. First, if either the Whitmore or Van Horn complaints were "pending with the Commission" on March 24, 1972 (the date of enactment of the 1972 amendments), the new 180-day limitations period would apply. Pub. L. 92-261, § 14 (quoted in Historical Note to 42 U.S.C.A. § 2000e-5). See *Inda v. United Air Lines, Inc.*, 565 F.2d 554, 560 (9th Cir. 1977). Second, discovery might turn up a prior EEOC charge, thus resulting in a different tolling date. Third, the limitations period for filing with the EEOC is extended if the complaint has first been lodged with a state agency with EEOC-like powers. 42 U.S.C. § 2000e-5(e). Prior to the 1972 amendments, a complainant filing first with such a state agency had 210 days after the discrimination to file with the EEOC. The 1972 amendments extended this to 300 days. Apparently neither Van Horn nor Whitmore filed charges with a state agency. However, the plaintiffs have suggested that Helen Read Gunst or another member of the class may have filed with a state agency before filing with the EEOC, thus entitling her to the extended limitations period. If discovery reveals this to be the case, the tolling date would be 210 or 300 days prior to the filing of the newly-discovered complaint with the EEOC, depending on whether that complaint was still "pending with the Commission" on March 24, 1972, so that the 1972 amendments apply. It is possible, therefore, if the 210 or 300-day limitations periods apply, that the class would include all stewardesses claiming from July 2, 1965, the effective date of Title VII.

11. It is immaterial that their charges were not denominated class charges. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975), certiorari denied, 421 U.S. 1011; *Inda v. United Air Lines*, 565 F.2d 554 (9th Cir. 1977).

12. United argues that the only EEOC charges which can toll the statute are those of the named plaintiffs in the *Romasanta* class action, or at least those EEOC charges of persons who could have instituted suit on their own behalf. Since the EEOC proceedings on the Whitmore and Van Horn charges were never completed and

(Footnote continued on next page.)

A10

Reversed and remanded for further proceedings consistent herewith.

A true Copy:

Teste:

.....
*Clerk of the United States Court of
Appeals for the Seventh Circuit*

(Footnote continued from preceding page.)

right-to-sue letters never issued, these charges could not have been the basis for suit. However, United does not dispute that the reason the Whitmore and Van Horn charges were never completed was that Carole Romasanta received her right-to-sue letter first and instituted this suit as a class action. Whitmore and Van Horn were not required to go through the needless exercise of pursuing conciliation in order to intervene in the *Romasanta* suit when class status was denied in December 1972. Similarly, neither the fact that the administrative process was not completed nor the fact that Whitmore and Van Horn later settled their individual claims means that their EEOC filings cannot be preserved as the event which tolled the statute for the class of which they were members.

A11

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 25, 1979.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOHN MINOR WISDOM, Senior Circuit Judge*

Hon. ROBERT A. SPRECHER, Circuit Judge

LIANE BUIX McDONALD,
Plaintiff-Appellant,
v.

UNITED AIR LINES, INC.,
Defendant-Appellee.

Nos. 78-1699 and
78-2035

LIANE BUIX McDONALD,
Plaintiff-Appellee,
v.

UNITED AIR LINES, INC.,
Defendant-Appellant.

} Appeal from the United
States District Court
for the Northern Dis-
trict of Illinois, East-
ern Division.

No. 70 C 1157

Joseph Sam Perry,
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by United Air Lines, Inc., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

A12

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that "timely" be substituted for "any" in the third from last line of footnote 9 of the slip opinion.